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No. 04-1327

In The
# Supreme Court of the United States

BOBBY LEE HOLMES,

*Petitioner,*

v.

THE STATE OF SOUTH CAROLINA,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of South Carolina**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

In South Carolina, a criminal defendant's evidence of third-party guilt is inadmissible if, when comparing this evidence standing alone against the prosecution's evidence, the trial court finds that it fails to create a reasonable inference of innocence. In making this comparison, if the trial court finds the prosecution's evidence – and especially its forensic evidence – to be "strong," third-party guilt evidence is per se inadmissible because it is deemed, as a matter of law, to be insufficient to "overcome" the prosecution's evidence so as to create a reasonable inference of innocence.

1. Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?

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## OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App. 350-70) is reported at 605 S.E.2d 19. The order of the South Carolina court of general sessions (App. 133-38) is unreported.

## JURISDICTION

The South Carolina Supreme Court entered judgment on November 1, 2004, and denied a timely petition for rehearing on December 1, 2004 (App. 371-72). Bobby Lee Holmes filed a petition for certiorari on March 31, 2005 (timely under the extension of time that this Court approved on February 17, 2005), and this Court granted the petition on September 27, 2005. On October 14, 2005, this Court granted Holmes an extension until November 30, 2005 to file this brief. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

The Sixth Amendment of the Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

## STATEMENT OF THE CASE

### A. The Assault and the Victim's Description of Her Assailant

On December 31, 1989, between 6 and 7 a.m., eighty-six year old Mary Stewart was beaten, raped, and robbed in her York, South Carolina home, sustaining injuries that would eventually lead to her death. App. 355-56. After her attacker departed, Ms. Stewart returned a call from her friend Maggie Thrasher and reported that she had been assaulted by "a dark chunky fellow," "kind of short [and] dark skinned." App. 141-42. Thrasher contacted Alaine Byers, another friend of Ms. Stewart's, who had a key to her apartment. App. 142. Byers reached Ms. Stewart's apartment around 8 a.m. and found her in her bedroom. App. 142-43. When Byers asked who had attacked her, Ms. Stewart replied, "I don't know who he was. All I know is he was big and dark." App. 143-44.

After being contacted by Byers, three officers from the York City Police Department responded to the crime scene, arriving around 8:15 a.m. App. 144, 156-57. As the police began collecting evidence, Ms. Stewart was taken to the hospital where she described her assailant to a nurse as in his "late twenties." App. 149. Sometime later in the morning, Ms. Stewart also gave Lieutenant Wilson Barnett a taped statement. App. 157. She told Barnett that her assailant was wearing a blue or black sweatshirt, with the caveat that she could not see well without her glasses. App. 160-61. Ms. Stewart further described her assailant as "middle aged. He was young. He was not too young. And he, as I remember, his hair was not short and not too long . . . [his hair was] kind of long. Not too long, but a little longer than you [Lieutenant Barnett] usually wear it." App. 159-60.

**B. Holmes Becomes the Prime Suspect Even Though No Evidence Links Him to the Crime**

Earlier that same morning, about 5:00 a.m., York Police Officer Grady Harper had been dispatched to break up a disturbance at the Cannon Court Apartments, located roughly a mile from Ms. Stewart's home. App. 163-64. Harper found Bobby Lee Holmes and another man in an argument, surrounded by onlookers. App. 164-65, 175-76, 256-57, 271-72. Harper asked the group to disperse, and most did, but Holmes chose instead to taunt Harper with what Harper described as "a few choice words." App. 165-66, 172-73. Harper then called for back up, intending to arrest Holmes, who had been in some scrapes with the law before. App. 166. As soon as additional officers arrived, Holmes ran. App. 166, 175-76, 257-58. After hiding behind a brick wall, he managed to flag down and jump into a friend's car. App. 169-70. Within minutes, however, Harper caught sight of Holmes and initiated a traffic stop of the car in which he was riding. App. 169-70, 178, 259-60. Once again, Holmes ran, this time eluding both Harper and a second set of officers called to join the chase. App. 170-72, 174-75, 259-60. The police last reported seeing Holmes at 5:20 a.m. (roughly an hour before Ms. Stewart's assault), nearly a mile from Ms. Stewart's apartment running in the opposite direction from it. App. 173, 175.

By 11:30 a.m., the police identified Holmes – the man who had so frustrated them in the early morning – as the prime suspect in the attack on Ms. Stewart. App. 183. At the time, the police had no physical evidence linking Holmes to the crime and no witnesses placing Holmes near Ms. Stewart's apartment at any time, much less near the time of the assault. App. 206-07. (Indeed, no such witness ever has emerged). App. 207. To the contrary, the police had a physical description from the victim – middle-aged with longish hair – that did not match Holmes, who had just turned eighteen years old and had close-cropped

hair. App. 179, 208-09, 327-28. (In particular, Holmes had shorter hair than Lieutenant Barnett, who, according to Ms. Stewart, had shorter hair than her assailant). App. 159, 208-09. The police also had received information from at least two of Ms. Stewart's neighbors that a man with a long police record named Jimmy White had been on Ms. Stewart's street around the time of the assault. App. 14-15, 96-99; *see also* App. 29-33. White was older than Holmes, sported longer hair (thus more closely resembling the description Ms. Stewart gave of her attacker), and also had a history of violence, including an attack against an older woman (in contrast to Holmes, whose arrest record was not remotely comparable). App. 14, 74-82, 131, 199.

Nonetheless, during the afternoon of December 31, two York police officers went to Holmes' residence to arrest him, not for the assault on Ms. Stewart, and not even for his conduct early that morning when he ran from the police, but for a completely unrelated theft. App. 179-80, 183-88. Two months later, the State charged Holmes with the Stewart crimes,[1] and then prosecuted him based mainly on forensic evidence.

### C. Holmes' Proffer of Relevant and Competent Evidence That a Third Party, Jimmy White, Committed the Stewart Crimes

Holmes consistently proclaimed his innocence, App. 209, 253-54, 270, and intended at trial to raise a reasonable doubt as to his guilt based in large part on evidence that Jimmy White actually had attacked and killed Ms. Stewart.[2] This evidence would serve two related functions.

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[1] Indictment for Criminal Sexual Conduct, Feb. 26, 1990; Indictment for Robbery, Feb. 26, 1990; Indictment for Burglary, Feb. 26, 1990; Indictment for Murder, Apr. 9, 1990 (following Ms. Stewart's death).

[2] This was in fact a retrial for Holmes. His initial trial, held in April 1993, ended in conviction on all counts. *See State v. Holmes*, 464 S.E.2d 334

(Continued on following page)

First, because it was undisputed that Ms. Stewart was assaulted by only one person, the evidence that Jimmy White committed the crime directly supported Holmes' claim of innocence. Second, the third-party guilt evidence bolstered Holmes' contention that the State's forensic case against him was unreliable because it stemmed from an investigation in which the police had either mishandled key items of evidence or had planted evidence in order to reinforce their initial decision to pin the crime on Holmes.

At a pretrial hearing, Holmes proffered substantial evidence pointing to White's guilt. As a starting point, Holmes produced four "proximity" witnesses, neighbors of Ms. Stewart, all of whom saw White haunting the very same block where Ms. Stewart lived shortly before 6 a.m. on the morning of the assault. App. 360-61. Frenetta Jamison testified she saw White going toward the apartments where the victim lived between 4:30 and 5:30 a.m., a time frame she eventually refined to "from four-thirty to something to five." App. 5-9. Meshelley Gilmore testified she observed White in the apartment parking lot across from Ms. Stewart's home as she drove away from her home at about 3:30 or 4 a.m., and that he was still there when she returned at 4:30-4:45 a.m. App. 9-14. Delores Brown testified she saw White walking down the victim's street in the direction of the victim's apartment between 4 and 5 a.m. App. 95-98. Eighty-seven-year-old Annie Boyd, who lived nearly adjacent to Ms. Stewart, testified that someone knocked on her door during the night of December 30-December 31. App. 28-32. The knocker said, "Open the door. . . . My man, this is Jimmy, open the door." App. 30.

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(S.C. 1995). But that outcome was overturned in state post-conviction proceedings because of the trial court's failure to secure a valid waiver of Holmes' right to make a closing argument and previous trial counsel's failure to advise him that he had such a right. *Holmes v. Moore*, 96-CP-46-966, Order (Jan. 15, 1998).

All these witnesses were independent of each other. Three knew White well enough to identify him confidently by sight. App. 7-8, 12, 96-97. (The other witness, Boyd, implicated White by describing the knocker's self-identification as "Jimmy"). App. 30. And two of the witnesses even told police on the morning of the attack that White was in the right place at the right time to have committed the crime. App. 14-15, 98-99.

Next, Holmes offered the testimony of four independent and mutually corroborating witnesses who heard White say that he was the person who had assaulted Ms. Stewart. App. 135. Steven Westbrook provided the most comprehensive testimony. According to Westbrook, while they were incarcerated together, White had confessed both that he had assaulted Ms. Stewart and that Officer James "Boot" Smith (who, according to Westbrook, harbored a grudge against Holmes) had told White to keep quiet about the case. App. 38-43. In addition, Westbrook said that Smith had approached him to testify falsely against Holmes and that employees of the prosecutor's office, in the course of soliciting his cooperation, spoke of manufacturing key evidence incriminating Holmes. App. 43-51. This trumped-up evidence, Westbrook stated, included blood evidence from Holmes' underwear and a palm print allegedly taken from Ms. Stewart's apartment door, which, according to Westbrook's account, actually came from a print Holmes left on a door at the county jail. App. 50. Westbrook also stated that Smith had threatened him if he testified on Holmes' behalf.[3] App. 51.

[3] Smith died long before Holmes' trial and was, thus, unavailable to be examined on these matters. App. 188.

Thomas Murray, Mattie Mae Scott, and Ken Rhodes each testified that White had told them that he, not Holmes, had assaulted Ms. Stewart. App. 105-07, 113-15, 117-24. Rhodes, for example, recounted that when he asked White about the "word on the street" that he was responsible for Ms. Stewart's murder, White "put his head down and he raised his head back up and he said well, you know, I like older women .... and he never called the lady's name but you know he say that he liked older women and that yeah he did what they say he did and you know that somebody else was locked up for it. And you know it's like he didn't have no regrets about it at all." App. 119-20. In his statements to Rhodes, moreover, White described Ms. Stewart as being alive when he left the apartment, thereby showing a detailed familiarity with the crime.[4] App. 120-21.

In his own testimony at the pretrial hearing, White also incriminated himself by giving a false alibi. In his testimony (as well as in an earlier statement to police), White admitted that he was in Ms. Stewart's neighborhood on the night in question, but claimed that he had returned to his home in Sharon, South Carolina more than four hours before the assault. App. 80-86. According to White, he received a ride home that night from an acquaintance named Joshua Lytle. App. 82-85. This claimed alibi, in addition to directly contradicting the proximity witnesses, was refuted by Lytle, who testified (as he had told the police earlier) that he did not take White back to Sharon. App. 134-35. White also denied ever confessing to the Stewart crimes, App. 88-90, thereby pitting his credibility against that of all the confession witnesses.

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[4] Two other witnesses, John Dixon and Nancy Bennett provided further corroboration for the four confession witnesses. Both described conversations in which White, at least indirectly, suggested that he, not Holmes, was guilty of the crime against Ms. Stewart. App. 36-37, 100-03.

Finally, Holmes offered evidence that White – whose physical appearance more closely matched Ms. Stewart's physical description of her assailant than did Holmes – had a penchant for older women and was prone to violent relationships.[6]

### D. The Trial Court Finds the Third-Party Guilt Evidence Probative of Innocence Yet Rules It Inadmissible

At the pretrial hearing, the prosecutor subjected each of these third-party guilt witnesses to extensive cross-examination. Despite these efforts, the trial court found the witnesses' testimony to have sufficient probative value as to Holmes' innocence to be admissible. Specifically, the trial court concluded that Holmes' proximity witnesses created an evidentiary basis from which a jury could find that White was in the right place at the right time to have committed the crime. App. 134. It also found that Lytle's testimony denying that he gave White a lift supported the proximity witnesses and that a jury could credit Lytle's repudiation of White's purported alibi. App. 134-35. The trial court further ruled that four separate witnesses provided testimony from which a jury could find that White, despite his in-court denial, did confess to beating

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[6] The evidence included the following: (1) Ken Rhodes' testimony that White liked older women; (2) Jimmy White's testimony that he had a history of violence against women, including striking a woman in the face and pushing his girlfriend to the ground (both incidents resulted in criminal convictions); and (3) a psychological evaluation of White concluding that he bore scars from physical altercations with both women and men and that he had sexual fantasies of dominance and control causing him to behave inappropriately and unpredictably. App. 74-80, 90-93, 121-22, 132.

and raping Ms. Stewart. App. 135.[6] The court also found that Holmes had presented testimony that "could be taken as evidence of a penchant for older women by Jimmy McCaw White," though the court considered this evidence "marginal." *Id.*

Nonetheless, the trial court excluded all of Holmes' proffered third-party guilt evidence. App. 137. It ruled that the most telling evidence – the testimony as to White's multiple confessions – was inadmissible hearsay. App. 135-37. Without the confession evidence, the court continued, the remaining third-party guilt evidence was insufficient to show "facts or circumstances which clearly point to Mr. White . . . as the person guilty of the beating and rape of Mary Stewart." App. 137. Absent such a showing, the court concluded, the evidence did not meet South Carolina's standard for admitting evidence of third-party guilt. App. 136-37.

As a result, Holmes was forced to proceed without the core evidence supporting his innocence defense. Instead of being able to present direct evidence (including multiple confessions) of an affirmative alternative to his own guilt, Holmes could only partially illuminate the inadequacies and anomalies of the police investigation and the forensic evidence it produced.

### E. The Police Investigation

The police investigation began at Ms. Stewart's apartment when the police arrived shortly after 8 a.m. on December 31. App. 156-57. Officer Dale Edwards collected Ms. Stewart's nightgown, robe, and slippers from the bathroom floor (where Ms. Stewart had dropped them)

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[6] Later, during the trial, the judge candidly stated that the confession testimony continued to "bother" him because it rose "to the level of raising some question" about Holmes' guilt. App. 140-41.

and placed all of them inside a single used paper grocery bag obtained from Ms. Stewart's kitchen. App. 146-48. Edwards assisted Lieutenant Barnett in folding the bed sheets, which, together with the pillow cases, they placed in another used grocery bag. App. 145, 157-58. Edwards also retrieved from Ms. Stewart a paper towel that she said had evidence on it. App. 146-48. During this evidence retrieval and collection, neither Edwards nor Barnett wore gloves. App. 148, 157-58.

Outside the apartment, another officer ran a bloodhound around the perimeter of the Stewart's apartment building. App. 161. The search yielded a man's tank top on a path leading from the apartments to a street circling the parking lot for the complex. App. 162-63. Although the police sent this evidence to the State Law Enforcement Division ("SLED") for forensic analysis, it was never tested for semen or DNA. App. 345-53.

Around 8:45 a.m., Captain William Mobley arrived to take charge of the investigation. App. 206. After locking the door to Ms. Stewart's apartment, he decided to process the crime scene by himself. App. 180, 206-07. Mobley testified that, in addition to taking photographs, he dusted the apartment and its contents for fingerprints, including the telephone and pocketbook that Ms. Stewart said her assailant had touched. App. 159, 180-81. On these, Captain Mobley purportedly found only smudges. App. 181-83. Indeed, at trial, Captain Mobley would claim that in the entire apartment – which belonged to an eighty-six year-old retiree and had been traipsed through by un-gloved police officers, neighbors and paramedics – he found just two usable prints. App. 143-44, 148, 157-58, 180-82. The first was a partial palm print that he claimed to have lifted from the interior of Ms. Stewart's door. App. 182. The second print was purportedly taken from the exterior of the door. *Id.* Captain Mobley also discovered a footprint, though he omitted it from his diagram of the crime scene. App. 205-06.

At 2 p.m., Captain Mobley and Officer Smith drove to the hospital where Ms. Stewart was initially admitted to pick up the rape kit containing vials of her blood. App. 151-53, 188. The rape kit, however, was both incomplete and compromised. Because of Ms. Stewart's condition, the nurse did not perform a pelvic exam; nor did she take fingernail scrapings. App. 152-53. Most important, the vacutainers she used to collect Ms. Stewart's blood had long since passed their expiration date, thus rendering the blood useless for DNA testing. App. 153, 243-44, 249, 301-02. Although law enforcement officers later obtained a second, more complete rape kit, it disappeared altogether. App. 154-55, 240-41, 299, 351.

By this time, Captain Mobley had made the decision to designate Holmes the prime suspect in the Stewart attack even though he had no evidence that Holmes engaged in any wrongdoing other than participating in a disturbance nearly a mile from Ms. Stewart's home that morning. Nor did Captain Mobley and Smith seek to justify their suspicion by taking the obvious preliminary step of showing Ms. Stewart a photo array with Holmes' picture so that she might identify him if, in fact, he was the assailant. App. 160, 206-07. Instead they went to Holmes' father's house to arrest him in connection with an unrelated theft. App. 179-80, 183-85, 188, 264. After finding Holmes in his bedroom wearing a black-hooded sweatshirt and a pair of briefs, the officers took him into custody and seized some of his clothes. App. 185-86.

### F. The Prosecution's Forensic Case and Holmes' Defense

Lacking eyewitness testimony linking Holmes to the attack on Ms. Stewart, the State based its prosecution almost entirely on "forensic" evidence. Specifically, the State argued that the following evidence tied Holmes to the crime: (1) three sets of allegedly "consistent" but

common fibers found on Ms. Stewart's and Holmes' clothing, App. 359; (2) DNA allegedly (but inconclusively) belonging to Ms. Stewart and Holmes derived from blood taken off a paper towel found in Ms. Stewart's apartment, and off Holmes' underwear and shirt that the police had seized, App. 243-45; (3) Holmes' palm print allegedly found on the interior of Ms. Stewart's door, App. 359; and (4) money ($44 in various denominations) found in Holmes' wallet that roughly coincided with an amount ($40) allegedly taken from Ms. Stewart, App. 142, 187-88.

In light of the trial court's ruling that he could not present an affirmative case arguing Jimmy White's guilt, Holmes prepared a three-prong defense.

First, he intended to attack his prosecution as a rush to judgment, the result of a sloppy investigation that failed to pursue other leads, such as the tank top found near the scene and the footprint found at the scene.

Second, Holmes planned to attack the prosecution's "forensic" evidence. Specifically, he intended to raise a reasonable doubt as to his innocence with evidence that the blunders in the collection of evidence compromised the testing; that in any event the forensic test results were inconclusive; and, finally that, regardless of the test results, the blood evidence had been planted by Captain Mobley, the senior officer who arranged to handle all the physical evidence himself, unobserved, and who "discovered" some of the most incriminating evidence after locking everyone else out of Ms. Stewart's apartment.

And third, Holmes planned to highlight the inherent implausibility of the State's account that a young man being chased by the police raced nearly a mile across town to break into a randomly chosen apartment and rape an elderly woman.

The trial court initially ruled that Holmes could use the third-party guilt evidence regarding Jimmy White for the limited purpose of cross-examining the State's police witnesses about their investigation, including asking why the police – having been told that White, a felon with a history of violence toward elderly women, had been near Ms. Stewart's apartment around the time of the assault – decided not to test the footprint found at her apartment against White (it did not match Holmes) or to test White's clothes for the victim's blood. App. 140-41, 198-200. But just before the defense began its cross-examination of police witnesses, the court reversed course and denied the defense any use of the third-party guilt evidence whatsoever. App. 200-02. The result of this ruling was to limit Holmes' defense mainly to expert testimony attacking the State's forensic evidence collection and testing, as well as a circumstantial case raising the possibility of a police frame-up.

In beginning this severely constrained defense, Holmes presented testimony that the methods the police used to collect evidence created a severe risk of evidence contamination. Holmes also presented testimony that the DNA evidence was planted by the police. Much of the "forensic evidence" was consistent with Holmes' defense that, having been designated the prime suspect because he had angered the York police on the morning of the crime, the investigating officers framed him for the attack on Ms. Stewart. In particular, Holmes' defense focused on the questionable conduct of Captain Mobley.

### 1. Fiber Evidence

As a threshold matter, Holmes' expert testified that fiber evidence, even when properly collected, has little inherent probative value. App. 321-24. In the expert's view, moreover, the evidence collection in this case was anything but proper. The officers who gathered evidence from Ms. Stewart's home conceded that they did not wear gloves

while collecting the evidence and placing it in used paper bags from Ms. Stewart's kitchen. App. 146-48, 157-58. After all the evidence was collected, Captain Mobley created evidence logs. App. 189-91. He testified that while creating the logs he went through all the evidence from the case simultaneously, including both Stewart's and Holmes' items, without wearing gloves and without washing his hands between handling individual items of evidence. *Id.* As defense expert John Kilbourn explained, fiber evidence is easily transferred. App. 313-15. Because Captain Mobley failed to wash his hands or put on new gloves between handling items of evidence obtained from Ms. Stewart and items of evidence obtained from Holmes, he could easily have transferred fibers between Holmes' items and Ms. Stewart's. *Id.*

The State's fiber analyst compounded the danger of contamination by using the "scraping method" to obtain the fiber samples. App. 227. This method involves hanging items of evidence in the air and using a metal instrument to scrape off fibers. App. 315-16. As Kilbourn testified, the scraping process often leaves fiber particles in the air, free to land on other items of evidence brought in for testing. App. 317-18. To minimize this well-known risk, fiber analysts typically scrape evidence from the suspect and the victim in separate rooms and on different days. App. 314-15, 317-18. A different analyst may even handle each item. App. 317-18. Here, the fiber analyst testified that he scraped evidence from Hol· .es' belongings and Ms. Stewart's belongings in the same room. App. 227. There is no evidence that he scraped the items on different days. Further, Kilbourn opined that two sets of the allegedly "consistent" fibers came from a third source, meaning that they did not come from Holmes' clothing or from Ms. Stewart's nightgown and bed sheets. App. 227-32. Yet the State made no effort to determine the source of these stray fibers. App. 230-32.

Defense experts also testified that the State's fiber analyst relied on imprecise and outdated methods to determine whether the fibers found on Holmes' clothing matched the fibers found on Ms. Stewart's bed sheets and nightgown. App. 316-23. After using a microscope to conclude that the material and general color of the fibers were consistent, the analyst failed to perform either an Optical Property Refractive Index test ("OPRI") or chemical analysis of the fibers' dye. App. 319-23. An OPRI test would have given the fiber analyst a more precise color match, while a chemical analysis of the dye could have more reliably shown that the fibers were consistent. App. 319-23.

**2. DNA Evidence**

As with the fiber evidence, Holmes introduced expert testimony that the DNA evidence taken from Holmes' underwear and shirt was compromised by the officers' careless handling. As two defense experts explained (and the prosecution's expert confirmed), officers can transfer DNA through such handling. App. 247, 299-300, 302-03. The relatively small amount of blood on Holmes' clothing, App. 236, was consistent with a cross-contamination theory that, if accepted, could have nullified the probative value of the DNA test results.

Holmes also presented circumstantial evidence that Captain Mobley planted the DNA allegedly found on Holmes' clothing and on the paper towel. During the investigation, Ms. Stewart's rape kit – which contained her blood, her vaginal swab, her rectal smear, and her saliva – disappeared. App. 154-55, 240-41, 299, 346. The missing blood samples and rectal smears, together with the blood sample the police took from Holmes, provided Captain Mobley with ample opportunity to plant Ms. Stewart's blood-derived DNA on Holmes' clothing and Holmes' blood-derived DNA on the paper towel. Despite

the disappearance of the rape kit and the self-evident concern about evidence tampering, the State failed to test the blood ultimately found on Holmes' clothing or the DNA ultimately found on the paper towel for the preservatives known to be in the missing blood samples. App. 248, 299-301. Such testing for preservatives is common practice when blood samples are missing because of the danger that they have been used to plant evidence. App. 299-301. The State offered no explanation for its failure to test for preservatives.

This omission was even more suspicious in light of the fact that the evidence log Captain Mobley generated when he originally collected the physical evidence made no mention of blood or other stains on Holmes' shirt or underpants, even though other evidence logs referenced the existence of blood or other stains on collected items. App. 193-95. While the evidence log does note blood on the paper towel, Captain Mobley did not turn the paper towel over to the South Carolina Law Enforcement Division (SLED) until eight days after he provided SLED with the rest of the evidence. App. 192-94. At trial, Captain Mobley failed to give a coherent explanation for failing to send the allegedly bloody paper towel promptly to SLED. App. 192-93.

Finally, Holmes' expert testified that the charts generated from the DNA mixtures from the blood on Holmes' shirt and underwear exhibited abnormal markings that SLED had improperly assessed in reaching its results. App. 304-10. In light of the unusual and unaccounted for markings on the charts, Holmes' expert opined that the evidence could not reliably establish that the DNA mixture came from Holmes and/or Ms. Stewart. App. 308-10.

### 3. Print and Money Evidence.

Holmes presented evidence that the palm print Captain Mobley allegedly found on the interior of Ms. Stewart's door was planted or came from another place. When a

person touches a rough or uneven surface, the surface creates striations in his or her print. App. 216-17. Both defense and prosecution experts agreed that the palm print attributed to Holmes contains striations indicative of a rough surface. App. 216-17, 326-27. According to defense expert and former SLED agent Donald Girndt, however, the interior of Ms. Stewart's door is not the type of surface that would create such striations. App. 325-27. Mobley's testimony regarding fingerprints was also dubious. For example, he claimed to have been able to lift only two usable prints from the whole apartment (App. 181-82) – an inherently implausible claim that was contradicted by prosecution expert and SLED Agent Steven Derrick. According to Derrick, if the police had used some of the more sophisticated available methods for collecting fingerprints (instead of just the rudimentary dusting technique employed by Mobley), they might have used the purportedly "smudged" prints taken from Ms. Stewart's telephone and pocketbook. App. 203-04, 218-22. These were items the assailant had touched, but which Mobley conveniently deemed unimportant and therefore dispensed with before trial. App. 159, 202-04. In addition, the donor of a second print found on Ms. Stewart's door was never identified, except that Holmes was ruled out. App. 210-11.

Finally, instead of testing the money found in Holmes' wallet for Ms. Stewart's prints, as could readily have been done according to defense expert Girndt, App. 192, 325, the State simply decided that Holmes' possession of the commonplace amount of $44 – in various denominations – somehow implicated him in the theft of $40 – in unknown denominations – from Ms. Stewart, App. 187-88.

### G. In Closing Argument the Prosecutor Emphasizes the Absence of Third-Party Guilt Evidence

In closing argument at the guilt-or-innocence phase of the trial, the prosecutor, having successfully excluded

Holmes' evidence of third-party guilt, argued that Holmes' failure to introduce such evidence showed that he was the guilty party. On numerous occasions, the prosecutor remarked on Holmes' failure to introduce evidence that a third party committed the crime. App. 337-38. Summing up the point, the prosecutor explicitly stated, "if you are going to frame them (*sic*) and it's going to be Bobby Holmes, where is the raping, murdering, beating fellow that actually did this thing?" App. 338.

Holmes' counsel objected to the prosecution's tactics as soon as the prosecutor ended his closing argument and requested a mistrial. Pet. App. 26a-28a. Counsel argued that the prosecutor's remarks prejudiced Holmes because of the exclusion of the third-party guilt evidence, and that a new trial was necessary so that the evidence could be presented in response to the prosecution's comments. *Id.* at 28a-29a. When the trial court denied relief, *id.* at 29a, Holmes requested a special curative instruction, which was also ultimately denied, *id.* at 30a. The jury then convicted Holmes on all counts. App. 338-39.

At the sentencing phase, Holmes once again attempted to introduce the evidence of White's guilt. App. 341. Holmes maintained both that the information was relevant mitigating evidence and that its exclusion would amount to a denial of due process. Again, the trial court excluded the evidence. *Id.* The jury sentenced Holmes to death. App. 343-44.

### H. The South Carolina Supreme Court Rules the Third-Party Guilt Evidence Inadmissible Because It Cannot "Overcome" the Prosecution's Forensic Case

On direct appeal, the South Carolina Supreme Court affirmed Holmes' conviction and sentence. App. 354. The court did not disturb the trial court's finding that Holmes had presented sufficient evidence from which a jury could

conclude that Jimmy White had the opportunity and motive to attack Ms. Stewart and that he had confessed to no fewer than four people. At the same time, the court disregarded the trial court's rationale for nonetheless excluding the evidence – namely, that the confession evidence was inadmissible hearsay.

As a starting point for its own reasoning, the court followed its precedents holding that, in order to be admissible, third-party guilt evidence must involve "a train of facts or circumstances as tends clearly to point out such other person as the guilty party" and, accordingly, that defendants are not permitted to introduce evidence that "can have no other effect than to cast bare suspicion on another" or that calls for "conjectural inferences" or "fanciful analogy."[7] App. 364. But the court then went much further than its prior holdings. It held that, in assessing whether a defendant's third-party guilt evidence meets this standard, a court must evaluate that evidence in light of the strength of the prosecution's entire case and admit the third-party guilt evidence only when it "overcome[s]" the prosecution's evidence to the point of "rais[ing] a reasonable inference of [the defendant's] own innocence." App. 365. The court further decreed that, when there is "strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt does not raise a reasonable inference as to the appellant's own innocence." App. 364. In such circumstances, even third-party guilt evidence such as that presented in this case – evidence that, if believed, could easily raise a reasonable doubt as to Holmes' guilt – "cannot overcome the forensic evidence" and thus fails the test of admissibility as a matter of law. Despite Holmes' contention that the trial court's exclusion of the third-party guilt

[7] *State v. Gregory*, 16 S.E.2d 532, 534-35 (S.C. 1941); *State v. Gay*, 541 S.E.2d 541 (S.C. 2001).

evidence violated his Sixth, Eighth, and Fourteenth Amendment rights, the state court analyzed the matter solely as an issue of state law.[8] App. 363-66.

Judge Pleicones dissented. Although, like the majority, he did not follow the trial judge's hearsay ruling, Judge Pleicones shared the trial judge's view that the third-party guilt evidence raised a "reasonable inference" of Holmes' innocence. App. 369-70. For that reason, Judge Pleicones concluded that the evidence was admissible and, accordingly, he would have granted Holmes a new trial. *Id.*

## SUMMARY OF ARGUMENT

Applying its idiosyncratic rule governing the admissibility of third-party guilt evidence, the South Carolina Supreme Court held that Bobby Lee Holmes was barred from offering evidence at trial that another man had committed and confessed to the crimes for which Holmes was tried, convicted, and sentenced to death. The exclusion of this evidence, which the trial court found to be sufficient for a jury to credit, violated Holmes' constitutional right to present a complete defense to a jury. This right has several mutually reinforcing components.

First, it encompasses the right to have a jury find the facts of guilt or innocence by evaluating the credibility of witnesses, weighing the evidence, and resolving conflicting inferences that may be drawn from that evidence. It also imposes a corresponding burden on the prosecution to prove to the jury the facts that demonstrate guilt beyond a reasonable doubt. The South Carolina Supreme Court's standard

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[8] In the course of summarily denying Holmes' other grounds for appeal, the Court also declined to address the constitutionality of the State's emphasis in its closing argument on the absence of third-party guilt evidence. App. 367-68.

for the admissibility of third-party guilt evidence transfers the jury's fact-finding function to a judge, who is tasked with comparing the defendant's third-party guilt evidence against the prosecution's entire case, and is instructed to exclude that evidence, unless, after assessing the credibility of witnesses and weighing the conflicting evidence and inferences, he decides that the third-party guilt evidence "overcomes" the prosecution's whole body of evidence and establishes a "reasonable inference" of innocence. Compounding this constitutional infirmity, if the prosecution's evidence, and especially its forensic evidence, is "strong," then third-party guilt evidence automatically cannot overcome the prosecution's evidence. Applying that standard here, the South Carolina Supreme Court, based on a cold record, concluded that in its eyes, Holmes' evidence of third-party guilt was not sufficient to overcome the State's case. In addition to appropriating the jury's fact-finding role, the South Carolina Supreme Court relieved the prosecution of its constitutional burden of proving to the jury guilt beyond a reasonable doubt by insisting that, as a preliminary matter in front of judges, the defendant demonstrate that his third-party guilt evidence overcomes the prosecution's case.

Second, the right to present a complete defense to the jury encompasses the right to compel the attendance of defense witnesses at trial. For decades now, this Court has admonished that the latitude of states to fashion rules of evidence must be balanced against the right of defendants to call witnesses in their defense. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court struck the balance in favor of the defendant and held that a state could not mechanistically apply its hearsay rules to prohibit the introduction of third-party guilt evidence, including evidence that another man had confessed to the crime for which the defendant had been charged. That balance tips heavily toward Holmes in this case. The impact of excluding third-party guilt evidence was more drastic here than it was in *Chambers*. The defendant in *Chambers* was at least

able to present some evidence pointing to another culprit. Holmes, by contrast, was prohibited from presenting any such evidence and thus lost the crux of his defense. Furthermore, the rationale for excluding the third-party guilt evidence in *Chambers* – ensuring the reliability of testimony – rested on firmer footing than South Carolina's justification for excluding the third-party guilt evidence here. The South Carolina Supreme Court did not ground its strict and apparently unprecedented rule governing the admissibility of third-party guilt evidence on the need to ensure reliability. In fact, the Court left undisturbed the trial judge's determination that Holmes' evidence of third-party guilt that Holmes sought to introduce was sufficiently reliable that a jury could find that another man had been at the right place at the right time to commit the crimes for which Holmes was charged, and then had confessed to committing those crimes no less than four times.

Third, the right to present a complete defense to the jury encompasses the right of the defendant to confront the government's witnesses at trial and to cross-examine them before the jury. This Court has long recognized that how a witness fares in the crucible of cross-examination greatly affects the jury's assessment of the witness' credibility and facilitates the exercise of the jury's function to weigh competing evidence and find the facts supporting guilt or innocence. Here, Holmes was deprived of a meaningful opportunity to cross-examine the State's witnesses, in particular the police officers who testified against Holmes at trial, about the evidence of third-party guilt that pointed to a different culprit. Such cross-examination could have magnified the holes in the State's purported forensic case against Holmes and supported Holmes' theory that his prosecution amounted to a rush to judgment by law enforcement authorities who decided to pin the crime on him from day one of the investigation.

## ARGUMENT

This Court repeatedly has held that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotation omitted). This right, which the Court has described as among the most fundamental to our system of ordered liberty, *see, e.g., Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), has several components. It includes the right to have an impartial jury serve as the trier of all facts necessary for conviction, with the prosecution bearing the burden of proving to the jury guilt beyond a reasonable doubt. *E.g., Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). It includes a right to compel the attendance of witnesses at trial and to present those witnesses in defense of the charges brought. *E.g., Rock v. Arkansas*, 483 U.S. 44, 61-62 (1987); *Crane*, 476 U.S. at 691; *Washington v. Texas*, 388 U.S. 14, 22 (1967). And it includes a right to subject the prosecution's case to "the crucible of meaningful adversarial testing" by confronting and cross-examining the prosecution's witnesses at trial. *Crane*, 476 U.S. at 690-91. Together, these constitutional guarantees reflect the "conviction . . . that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined" by the trier of fact. *Washington*, 388 U.S. at 22. Each of these guarantees was violated by the South Carolina Supreme Court's decision affirming the exclusion of Holmes' evidence that another person, Jimmy White, actually committed the crimes for which Holmes was tried, convicted, and sentenced to death.

### A. The Exclusion of Third-Party Guilt Evidence Violated Holmes' Right to Trial by Jury

#### 1. South Carolina's Standard for the Admissibility of Third-Party Guilt Evidence Unconstitutionally Diminishes the Jury's Role to Find Facts and Assess the Credibility of Witnesses in Criminal Cases by Transferring That Function to Judges

Three incontrovertible propositions make clear that South Carolina's approach to the admissibility of third-party guilt evidence cannot survive constitutional scrutiny. First, the Constitution guarantees every criminal defendant a trial by jury. Second, if a trial by jury means anything, it must mean that the jury serves as the trier of fact with exclusive responsibility for assessing credibility and weighing evidence. Third, the South Carolina Supreme Court's approach to admitting third-party guilt evidence transfers this inalienable jury function to the trial or appellate court by requiring that, to be admitted, a defendant's proffered third-party guilt evidence must "overcome" the prosecution's evidence of guilt to the point of creating a "reasonable inference" of innocence. App. 365.

Almost forty years ago, this Court held that the Due Process Clause of the Fourteenth Amendment guarantees a trial by jury in all criminal cases because this right, guaranteed in all federal cases by the Sixth Amendment, "is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). As the Court recognized then, and has reaffirmed many times since, the Constitution's Framers believed that the common-sense judgment of a jury was "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. This belief was no mere abstraction. The Framers had bitter experience with the transfer of power from local juries to judges appointed by the Crown as an instrument of monarchical

oppression and, for this reason, the right to trial by jury was "one of the least controversial" aspects of the original Bill of Rights. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); Akhil Reed Amar, *America's Constitution: A Biography* 329-32 (2005).

It is beyond dispute that this constitutionally guaranteed right to a jury trial contemplated that the jury would serve as the exclusive trier of fact in criminal matters. The very essence of trial by jury, as Blackstone described it, was the requirement that "*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors. . . ." 4 Blackstone, *Commentaries* *343 (emphasis added); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873); *United States v. Gaudin*, 515 U.S. 506, 510-11 (1995). An essential element of the jury's responsibility for assessing the truth of every accusation is "[d]etermining the weight and credibility of witness testimony . . . [which] has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'" *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (quoting *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891)). Decisions of this Court recognizing this premise are legion. *E.g., United States v. Bailey*, 444 U.S. 394, 414-15 (1980); *Pierce v. United States*, 252 U.S. 239, 251-52 (1920); *Hoke v. United States*, 227 U.S. 308, 324 (1913). As the Court recently summarized the point, "[t]here is not one shred of doubt . . . about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). That division, as Lord Coke succinctly put it, is simply this: "Judges do not answer questions of fact; juries do not answer questions of law." 1 Sir

Edward Coke, *The First Part of the Institutes of the Laws of England*, Lib. 2, Cap. 12 § 234 at 155(b) (Hargave and Butler, 16th ed. 1809) (translated from the Latin: "*Ad questionem facti non respondent judices . . . ad questionem juris non respondent juratores.*").

The entire structure of the American criminal process is tailored to safeguarding this "fundamental reservation of power in our constitutional structure." *Blakely*, 542 U.S. at 306. At the outset of every prosecution, the indictment must set forth all the facts and elements necessary for conviction on the offense charged, including those that bear exclusively on sentencing, so that the jury may determine whether the prosecution has proven each of these facts and elements beyond a reasonable doubt. *Apprendi*, 530 U.S. at 478 (citations omitted); *Blakely*, 542 U.S. at 309 (upholding "the jury's traditional function of finding the facts essential to lawful imposition of the penalty"). Moreover, at the close of evidence in a criminal case, the judge has no power to direct a verdict against the defendant. When a criminal charge is tried, the "question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt [is] for the jury, not the court, to decide." *Pierce*, 252 U.S. at 251-52; *see also Jackson v. Denno*, 378 U.S. 368, 386 n.13 (1964) ("[T]rial courts do not direct a verdict against the defendant on issues of credibility.").[9]

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[9] *Crane* illustrates the application of this vital distinction to the exclusion of exculpatory evidence. There, the State introduced the defendant's confession as the cornerstone of its case and then opposed the defendant's effort to discredit his confession by introducing testimony about the physical and psychological environment in which the confession was obtained. *Crane*, 476 U.S. at 684-86. According to the State, this evidence was inadmissible because the court's pretrial ruling that the confession was sufficiently "voluntary" to be introduced into evidence precluded the defendant from trying to undermine its force by presenting testimony that the confession had been obtained under

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The jurisprudence regarding the Seventh Amendment right to jury trial in the civil context powerfully reinforces this strict demarcation between the responsibility of judges to decide legal questions and the responsibility of juries to assess credibility, weigh evidence, and thereby find facts. *See Poller v. CBS, Inc.*, 368 U.S. 464, 467 (1962) (authority of courts to grant summary judgment under Rule 56 is cabined so as "not to cut litigants off from their right of trial by jury if they really have issues to try"); Fed. R. Civ. P. 50 advisory committee's note (1991 amendment) (limitations on use of Rule 50(a) "make[] clear that action taken under the rule is a performance of the court's duty to assure enforcement of controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment . . . ."). In constraining the power of judges to withdraw civil cases from juries through summary judgment, the Court has stressed that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Likewise, "in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990). Meticulously observing the distinct roles of judges and juries in civil matters, the Court has admonished that the weighing of evidence is a quintessential jury function that judges cannot appropriate under

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coercive conditions. *Id.* at 686. The state court excluded the defendant's proffered evidence on this ground, but this Court reversed. *Id.* at 686-87. It held unequivocally that, regardless of the trial court's determination that the confession met the legal standard for voluntariness, under the Sixth and Fourteenth Amendments, the "probative weight" of all otherwise admissible evidence bearing on the credibility of the confession was "a matter that is exclusively for the jury to assess." *Id.* at 688.

either Rule 56 or Rule 50. *See Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

The South Carolina Supreme Court's decision in this case mocks these principles. Under the guise of establishing a standard for admitting third-party guilt evidence, it usurps the jury's exclusive prerogative as the trier of fact to assess credibility and weigh evidence and arrogates this power to the court itself. According to the decision below, a defendant seeking to introduce third-party guilt evidence must sufficiently "overcome" the prosecution's evidence to raise a "reasonable inference" in the eyes of the trial judge as to the defendant's own innocence. In the absence of such a comparative showing, even if the third-party guilt evidence is relevant, competent, and otherwise admissible, the defendant will be prohibited – as Holmes was – from presenting it to the jury.

Applying this rule to the case at hand, the South Carolina Supreme Court specifically determined that because, in its view, the prosecution had "strong" forensic evidence, Holmes could not make the requisite showing even to allow his third-party guilt evidence to reach the jury. App. 364-65. In reaching this conclusion, the court engaged in an explicit weighing of the prosecution's evidence – including the forensic evidence, the evidence that Holmes matched Ms. Stewart's description of her assailant, and the evidence that he was on the victim's block at the time of the attack.[10] *Id.* The court also explicitly evaluated Holmes'

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[10] Here, as elsewhere, the court also misstated the record. Holmes did not fit the physical description and, unlike White, was not shown to be in close proximity to the victim's residence. App. 141-44, 149, 159-60, 179, 206-09, 327-28.

attempts to discredit the prosecution's forensic case through competing expert testimony. App. 365 & n.8. Implicit in the court's assessment were a myriad of credibility determinations regarding the competing witnesses who testified about the integrity of the police evidence collection and the results of the forensic testing, as well as an outright rejection of Holmes' proffered circumstantial and third-party guilt evidence that the police planted the blood evidence that yielded the forensic results the state court considered so damning. The impropriety of this approach is heightened by the fact that it was done by an appellate court operating solely from the cold trial transcript and without the benefit of observing the live witness testimony whose weight and credibility it was purporting to assess.

A more complete invasion of the jury's exclusive province, including its responsibility to serve as the "lie detector" for witness testimony, *Scheffer*, 523 U.S. at 313, is difficult to conceive. In effect, the decision below creates a two-trial system for criminal defendants seeking to introduce third-party guilt evidence. In the first trial, the defendant must convince a court that his third-party guilt evidence is not only competent, material, and relevant, but that standing alone, when weighed against the prosecution's evidence, it is sufficiently strong to "overcome" the prosecution's case and raise a "reasonable inference" of innocence. In the second trial – the one before the jury – the defendant gets to present his complete defense only if he wins the initial trial before the judge.

To be sure, states have considerable latitude in fashioning and applying evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (Stevens, J., dissenting) (quoting *Chambers*, 410 U.S. at 302). Third-party guilt evidence, like every type of evidence, is also subject to the demands of relevance, materiality, and

undue prejudice. *See Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (applying these constraints to admissibility questions generally). But in fashioning rules of evidence, no jurisdiction of which we are aware has a rule calling for a judge to evaluate the admissibility of evidence, not by assessing the proffered evidence in its own right,[11] but by weighing it against the strength of the other side's case, including drawing the inferences and making the credibility determinations necessary to conduct this analysis.[12]

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[11] To take but one example from the Federal Rules of Evidence, in playing the "gatekeeper role" of screening expert testimony offered by one party to ensure that it is reliable, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993), judges do not weigh the reliability of that testimony against competing expert testimony offered by the other party. Rather, the expert's reliability is evaluated on its own terms, and will be admissible for the jury's consideration if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. A judicial ruling based on an application of these standards that an expert's testimony is reliable in no way compels a ruling that contrary expert testimony offered by the other party is unreliable. *Id.* advisory committee's note (2000 amendments). The reliability of that party's expert testimony similarly will be evaluated on its own terms under the Rule 702 standards. And if the judge concludes that this testimony rests on "good grounds, based on what is known," *Daubert*, 509 U.S. at 590 (internal quotes omitted), it too is admitted for the jury's consideration where it will be "tested by the adversary process – competing expert testimony and active cross-examination – rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies." *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st Cir. 1988).

[12] The South Carolina Supreme Court's decision also presents trial judges with a practical nightmare. At a pretrial hearing on third-party guilt evidence, how is a trial court supposed to assess the credibility of prosecution witnesses it has not yet heard or weigh evidence not yet admitted? Is the prosecution really expected to preview its whole case for the defendant, and vice-versa? Certainly, such a procedure bears no

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Whatever the scope of state authority to devise rules of evidence to ensure reliability and protect against undue prejudice, it cannot extend to substituting judicial determinations of witness credibility and the relative strength of prosecution and defense evidence for those of the jury. To hold otherwise would be to give judges in a select class of cases the practical ability to predetermine guilt based on their own assessment of the evidence and to render the right to jury trial a sham affair in which only the government's relevant and competent evidence is heard. In *Apprendi* and *Blakely*, this Court held that government may not remove from the jury and give to judges the power to answer any factual question essential to punishment. *Blakely*, 542 U.S. at 308; *Apprendi*, 530 U.S. at 478. Surely, by the same token, government may not give to judges the power to remove from the jury access to the relevant and competent evidence necessary to carry out its inviolable fact-finding function. Both actions embrace precisely the proposition rejected by the Framers "that facts are better discovered by judicial inquisition than by adversarial testing," *Blakely*, 542 U.S. at 313. And both create precisely the problem that the constitutional right to a trial by jury was meant to preclude – that the State would take the power to determine guilt in criminal trials away from the people themselves and give it to judges.

This case demonstrates the pernicious effect of South Carolina's rule. Here, the trial court – in findings that

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similarity to the typical hearing on *in limine* motions, which assess the admissibility of challenged evidence in its own right, not in counterpoint to the other side's entire case. As this Court recognized in *Richardson v. Marsh*, 481 U.S. 200 (1987), the whole notion of such a pretrial show-and-tell is deeply problematic. Nor is it feasible for a trial judge to delay ruling on third-party guilt evidence until a defendant seeks to have it admitted. Such a procedure would subject defendants to the peculiar disadvantage of potentially losing the use of their entire defense strategy after the prosecution has already put on its case.

stand uncontradicted – specifically concluded that Holmes' third-party guilt evidence was sufficient for a jury to find that White confessed multiple times to the crime; that he was near the site of the crime near the time of the crime; that he generally fit the victim's description of her attacker; that he gave a false alibi; that he had some propensity for older women like the victim; and that he was a violent person. App. 134-35. This evidence, including four mutually corroborating third-party confessions, supported each aspect of Holmes' defense, namely that the forensic evidence was tainted, inconclusive, or planted, and that Holmes' prosecution was the product of a rush to judgment by police officers angered by their previous run-in with him. Like the improperly withheld third-party guilt evidence that compelled this Court to order a new trial in *Kyles v. Whitley*, 514 U.S. 419 (1995), the third-party guilt evidence here "would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." *Id.* at 445. Indeed, it can hardly be doubted that, had South Carolina put White on trial for the Stewart assault instead of Holmes, the third-party guilt evidence Holmes amassed, especially White's multiple confessions, would have been sufficient to sustain White's conviction for the crimes. Yet even though Holmes needed to do no more than raise a reasonable doubt as to his guilt, under the South Carolina Supreme Court's ruling, the jury heard not one iota of his third-party guilt evidence because, in light of the prosecution's purportedly "strong" forensic evidence, an appellate court deemed it per se inadmissible.

To be sure, courts commonly exclude evidence of third-party guilt when it shows only that another person had a motive to commit the crime or a mere propensity or opportunity to do so. Depending on circumstances, such evidence may not have sufficient probative value to be

deemed relevant or may have a marginal relevance that is outweighed by the potential for prejudice or jury confusion. *Johnson v. State*, 27 S.W.3d 405, 415 (Ark. 2000); *People v. Hall*, 718 P.2d 99, 104 (1986); *People v. Fort*, 618 N.E.2d 445, 455 (Ill. App. Ct. 1993). But no court, under ordinary rules of relevance and prejudice, could properly exclude Holmes' evidence that White confessed to the crime repeatedly and had both the opportunity and propensity to have attacked Ms. Stewart. As the trial court recognized, this evidence tended to show that White, not Holmes, committed the offenses charged. App. 134-35. The South Carolina Supreme Court could reach a contrary result only because it compared the weight of Holmes' third-party guilt evidence to that of the State's entire body of evidence, and drew its own conclusion as to the likelihood that Holmes was guilty.[13] Under the Sixth and Fourteenth Amendments, however, the assessment of guilt or innocence is a jury function. And for that reason, Holmes' conviction cannot stand.

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[13] Although not relevant to the legal issues raised here, the South Carolina Supreme Court's weighing of the evidence was badly misguided. In assessing the strength of the State's forensic case, for example, the court failed to consider the fact that Holmes' third-party guilt evidence directly supported his theory that either poor investigative and testing techniques had tainted the forensic results or that those results derived from blood evidence planted by the police. Also, to the extent the court intended to suggest that the forensic evidence tended to exculpate White, it erred. The fact that White's DNA did not appear on clothing samples that consisted mainly of Holmes' clothes has no probative value. Because White's clothes were never tested for Ms. Stewart's DNA and because the victim bathed immediately after the attack, the absence of DNA evidence linking White to the assault, in and of itself, neither inculpated nor exculpated White. App. 198-99, 356.

### 2. South Carolina's Standard for the Admissibility of Third-Party Guilt Evidence Reduces the Prosecution's Burden of Proving Guilt Beyond a Reasonable Doubt

The South Carolina Supreme Court's decision violated Holmes' right to a jury trial in a second related but independent fashion. Specifically, it unconstitutionally relieved the prosecution of its constitutionally imposed burden to prove guilt beyond a reasonable doubt by making the admissibility of defense evidence hinge on a defendant's ability to persuade a judge that the proffered evidence is sufficient to overcome the prosecution's case and raise a reasonable inference of innocence. *E.g.*, *Winship*, 397 U.S. at 364; *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). Under South Carolina law, it is not enough for a defendant to show that his evidence is genuinely probative of third-party guilt (as opposed to conjectural) or even that the evidence, if credited, is sufficient when considered together with other defense evidence to raise a reasonable doubt regarding his guilt. Instead, South Carolina law requires that a defendant show that the third-party guilt evidence, standing alone, "tend[s] clearly" to establish third-party guilt and further, "overcome[s]" the State's evidence to the point of raising a "reasonable interference" of innocence. Pet. App. at 11a-12a. Worse still, when the State presents what a court deems to be "strong forensic evidence" of guilt, South Carolina flatly prohibits the defendant from introducing third-party guilt evidence because, in such circumstances, third-party guilt evidence automatically does not raise a reasonable presumption of innocence and "cannot overcome" the State's case. App. 365.

While South Carolina's third-party guilt rule does not explicitly alter the prosecution's burden to prove guilt beyond a reasonable doubt, it lets the State meet that burden after forcing the defense to clear a preliminary hurdle – insurmountable in cases with strong inculpatory

forensic evidence – of overcoming the prosecution's evidence in order to get its own competent and relevant exculpatory evidence before the jury. The Constitution rejects such stacking of the evidentiary deck. In *Cool v. United States*, 409 U.S. 100 (1972) (per curiam), for example, this Court, invoking the Due Process Clause, declared unconstitutional a jury instruction that told the jury, in effect, "to ignore defense [accomplice] testimony unless it believes beyond a reasonable doubt that the testimony is true." *Id.* at 100. As this Court held, preconditioning the jury's consideration of defense testimony on a finding of truth beyond a reasonable doubt, "create[d] an artificial barrier to the consideration of relevant defense testimony" and, thus, "reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104. This principle applies with even greater force here, where the "preliminary burden" – the required judicial finding that the defendant's evidence "overcome[s]" the prosecution's – prevents the jury from even hearing the testimony at issue. Such an approach is simply incompatible with the reasonable doubt standard – "a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363.

### B. The Exclusion of Third-Party Guilt Evidence Violated Holmes' Constitutional Right to Call Witnesses in His Defense

"Few rights," this Court has held, "are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302 (citing *Webb v. Texas*, 409 U.S. 95 (1972); *Washington*, 388 U.S. at 19; *In re Oliver*, 333 U.S. 257 (1948)). As noted in *Crane*, 476 U.S. at 490, the Court sometimes has derived this right directly from the Fourteenth Amendment's Due Process Clause. *E.g.*, *Chambers*, 410 U.S. at 302. In other cases, the Court has located the right in the Sixth Amendment's Compulsory Process Clause. *E.g.*, *Washington*, 388 U.S. at 23. Regardless of the precise

source, this Court has carefully scrutinized state evidentiary rules curtailing a defendant's constitutional right to present a complete defense and has invalidated evidentiary bars to the admission of defense witness testimony. *E.g.*, *Rock*, 483 U.S. at 61 (overturning bar to admission of hypnotically refreshed testimony); *Crane*, 476 U.S. at 691 (overturning bar on introduction of evidence regarding the circumstances of a confession); *Washington*, 388 U.S. at 23 (overturning bar on testimony by accomplices or accessories).

Foundational to this line of cases is *Chambers v. Mississippi*, where the Court precluded the State from "mechanistically" applying its evidentiary rules to prohibit the defendant from introducing third-party guilt evidence very similar to the evidence at issue here. 410 U.S. at 302. *Chambers* compels reversal of the decision below.

Leon Chambers was charged with killing a Woodman, Mississippi policeman during a confrontation between a large crowd and law enforcement officers, who were trying to serve an arrest warrant on a local youth. *Id.* at 285-86. According to the prosecution, Chambers shot officer Aaron Liberty with a 22-caliber revolver during an exchange of gunfire in which Chambers also suffered a bullet wound. *Id.*

While Chambers awaited trial, another man who was in the crowd when Liberty was shot, Gable MacDonald, came forward with a sworn statement in which he confessed to the crime. *Id.* at 287. A month later, however, MacDonald repudiated the confession. *Id.* at 288. MacDonald claimed that a local minister had talked him into giving a false confession as part of a plan to exonerate Chambers and share in the proceeds from a lawsuit Chambers would bring against the town of Woodman. *Id.*

At trial, Chambers proclaimed his innocence and sought to defend himself both by undermining the State's eyewitness testimony that he fired at Liberty and by introducing evidence that MacDonald actually committed the crime. *Id.* at 289. This third-party guilt evidence

included MacDonald's repudiated confession, as well as the testimony of three friends of MacDonald who said that he had also confessed to them. *Id.*

In presenting this defense, Chambers was permitted to call MacDonald to the stand and to have his initial confession introduced into evidence and read to the jury. *Id.* at 291. The State then cross-examined MacDonald, eliciting his repudiation of the confession, his purported reasons for giving a false confession, and an alibi that he was drinking beer with a person named Berkley Turner when the shooting started. *Id.* at 291-92. In light of this testimony, Chambers requested that the trial court permit him to treat MacDonald as an adverse witness for the purpose of challenging MacDonald's repudiation and alibi. *Id.* at 291. The trial court, however, denied the request and precluded Chambers from challenging MacDonald's testimony on cross-examination. *Id.* According to the trial court, Mississippi's "voucher" rule barred Chambers from impeaching the testimony of one of his own witnesses. *Id.* at 294.

Chambers did succeed in potentially undermining MacDonald's story in other ways. Chambers called one witness who testified to seeing MacDonald shoot Liberty, another who refuted MacDonald's alibi, and a third who testified that MacDonald owned a 22-caliber revolver, the type of gun used to shoot Liberty. *Id.* at 293-94. But Chambers lost another important part of his defense when the trial court refused to admit the testimony of the three persons who claimed that MacDonald had confessed to them. The trial court found such testimony to be inadmissible hearsay because, in Mississippi, the hearsay exception for statements against interest was limited to statements against pecuniary interest and did not include statements against penal interest, such as MacDonald's alleged confessions. *Id.* at 292.

This Court reversed, holding that Chambers' constitutional right "to a fair opportunity to defend against the State's accusations" precluded the Mississippi courts from applying the State's voucher and hearsay rules to exclude the testimony at issue. *Id.* at 294. As especially relevant here, the Court concluded that even the venerated hearsay rule, developed to promote reliability in the truth-seeking process, must yield when the evidence to be excluded is "critical" to the defense and bears "assurances of trustworthiness." *Id.* at 302. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

From *Chambers* it follows *a fortiori* that Holmes was denied his constitutional right to present a complete defense and, specifically, his "right to call witnesses in his own behalf." *Id.* at 294. Although by its own terms *Chambers* does not sweep broadly, *id.* at 302-03, it embodies the basic principle that courts must balance the significance of the evidence at issue to the accused's defense against the underlying justification for the state evidentiary rule that would bar its admission. *See* Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976). Under *Chambers*, moreover, that balance must be struck in favor of admitting "critical" defense evidence, in particular evidence that a third party has confessed to the crime, absent a significant countervailing justification. On both sides of this balance, the case for admitting Holmes' third-party guilt evidence is substantially stronger than it was in *Chambers* – and, accordingly, *Chambers'* holding, notwithstanding its narrow reach, controls here.

First, with respect to the importance of the evidence to Holmes' defense, while Holmes and Chambers were kept from introducing nearly identical third-party guilt evidence, the effect was more drastic in Holmes' case.

Despite the exclusion of some of his third-party guilt evidence, Chambers was able to introduce significant evidence implicating MacDonald, including MacDonald's own confession and testimony of another witness contradicting MacDonald's alibi. By contrast, the South Carolina court excluded Holmes' third-party guilt evidence in its entirety and thereby devastated Holmes' planned defense. That defense was based on a narrative that Jimmy White committed the Stewart crimes while the police single-mindedly followed a baseless predisposition to pin the crimes on Holmes. The proximity and confession evidence implicating White provided essential and compelling support for both aspects of this story. The testimony pointed the finger directly at White, while also casting doubt on the state's forensic case as the product of either the police's incompetent handling of the evidence or the planting of evidence in support of their initial hasty decision to pursue Holmes as the prime suspect. With the exclusion of the third-party guilt evidence, Holmes lost the glue holding his account together and was relegated to arguing flaws in the forensic evidence that the jury may well have perceived as a resort to technicalities.[14]

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[14] This Court has previously recognized the importance of presenting a jury with the kind of complete evidentiary story that Holmes lost when his third-party guilt evidence was excluded. As the Court observed in *Old Chief v. United States*, 519 U.S. 172, 188 (1997), there is "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be," and juries "may well hold the absence of that evidence against the party" who fails to provide it. *Id.* at 188 n.9. Empirical analyses of jury decision-making are in accord. They show that jurors do not reason in a linear fashion – evaluating the weight of each piece of evidence individually and then entering that weight into the final calculus. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 511-13 (2004). Rather, they reason in a more holistic manner by ordering the information they hear into a narrative, or story. *See, e.g.*, John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 DRAKE L. REV. 559 (2005);

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In sum, this Court's conclusion that the excluded confession and cross-examination evidence in *Chambers* was "critical" and that its absence rendered Chambers' defense "far less persuasive than it might have been" applies with even greater force here. Holmes did not (like Chambers) merely lose additional corroborating evidence for a third-party guilt strategy; he lost that strategy entirely, as well as the core of the rest of his defense.

On the other side of the *Chambers* balance, the State's justification for excluding the third-party guilt evidence, in particular the confession testimony, was stronger in *Chambers* than it is here. In *Chambers*, Mississippi courts excluded the confession evidence pursuant to Mississippi's policy determination that statements against penal interest are not sufficiently reliable to qualify as an exception to the hearsay rule. In overriding this policy judgment in the particular circumstance of Chambers' case, this Court recognized that Mississippi's distinction between statements against pecuniary interest and statements against penal interest, despite "considerable scholarly criticism, . . . might

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Peter Brooks, *Narrativity of the Law*, 14 LAW & LITERATURE 1 (2002); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994); Richard Lempert, *Telling Tales in Court: Trial Procedure and the Story Model*, 13 CARDOZO L. REV. 599 (1991). The prosecutor in this case clearly understood this point – and exploited it by emphasizing in closing argument Holmes' inability to provide a story with an alternative culprit. Ridiculing Holmes' claim that the police framed him, the prosecutor exclaimed: "[I]f you are going to frame them (*sic*) and it's going to be Bobby Holmes, where is this raping, murdering, beating fellow that did this thing?" App. 338. Holmes objected that the prosecutor's argument violated due process, but the state court ruled that Holmes waived the argument by waiting to object until the end of the prosecutor's close rather than interrupting contemporaneously. App. 366-67. In his Petition for Certiorari, Holmes argued that the prosecutor's closing argument violated the rule of fair rebuttal in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1 (1986). This Court denied certiorari on this issue.

serve some valid state purpose by excluding untrustworthy testimony." 410 U.S. at 300. Nonetheless, the Court held that because the Chambers' third-party confession evidence was critical to the defense and bore various indicia of trustworthiness, the Constitution compelled an exception to the State's generally applicable evidentiary rule in his case. *Id.* at 300-02.

South Carolina can provide no similarly valid justification for excluding Holmes' third-party guilt evidence. The decision below nowhere calls into question the trustworthiness of that evidence. To the contrary, the court left untouched the findings of the trial judge – who had observed the witnesses – that a jury could determine, based on Holmes' third-party guilt evidence, that Jimmy White was very close to Ms. Stewart's home at or about the time of the attack and that White confessed to at least four people that he committed the crimes. Nor did the South Carolina Supreme Court invoke any of the "familiar," generally applicable rules of evidence "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Scheffer*, 523 U.S. at 330 n.17 (Stevens, J., dissenting) (quoting *Chambers*, 410 U.S. at 302).[15]

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[15] The trial court explained its decision to exclude Holmes' third-party confession evidence on grounds arguably related to reliability – namely, that the testimony of the confession witnesses did not fit within South Carolina Rule of Evidence ("SCRE") 804(b)(3), governing the hearsay exception for statements against interest because, purportedly, the contents of the statements were not sufficiently corroborated by other evidence. App. 135-37. Had the South Carolina Supreme Court adopted this ground for exclusion, it would have set up nearly an exact replay of *Chambers*. But it did not adopt this analysis. And with good reason. The trial court was demonstrably wrong in its hearsay ruling. First, SCRE 804(b)(3) does not apply to the confession evidence. It applies only when the declarant is unavailable. SCRE 804(b). The declarant here, White, was not only available (in the county jail), he testified at the pretrial hearing. App. 74-93. Second, even if SCRE 804(b)(3) were somehow deemed to apply, the trial court still erred.

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Instead, the South Carolina Supreme Court applied a special rule, applicable only to a defendant's third-party guilt evidence, to declare relevant, competent, and otherwise admissible evidence to be inadmissible solely because it is, purportedly, not strong enough to "overcome" the prosecution's case and raise a reasonable inference of innocence. Worse still, the court ruled that defendants simply cannot meet this standard when the prosecution presents "strong forensic evidence." Forensic evidence, though, which is basically opinion evidence, is not sacrosanct. Such evidence is vulnerable to what is known colloquially as the "garbarge in, garbage out" phenomena, meaning that its probative value depends on the integrity of the police collection techniques, the quality of the expert analysis, and, of course, whether the police planted the source material from which the forensic results were derived. As was true in this case, relevant third-party guilt evidence tends to raise doubts about the validity of inculpatory forensic results, however facially "strong" they might be. Accordingly, far from advancing the truth-seeking function, the effect of South Carolina's rule is to

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Contrary to the court's ruling, SCRE 804(b)(3) does not require clear corroboration of the *contents* of the statements at issue. It requires corroboration only for the fact that the statement at issue was actually made – a standard clearly met by the confession evidence here. *See State v. Kinloch*, 526 S.E.2d 705, 707 (S.C. 2000); *State v. Wannamaker*, 552 S.E.2d 284, 287 (S.C. 2001). Third, because White was available to testify, Holmes could have introduced the confession evidence under SCRE 801(d)(1)(A) as a prior inconsistent statement of White's. In this scenario, the hearsay rule would have been entirely inapplicable. In any event, the confession evidence Holmes sought to introduce bore many of the same indicia of reliability as the evidence this Court held to be reliable in *Chambers*. Each of Holmes' confession witnesses reinforced the reliability of the others. None of these witnesses had an apparent motive to lie. Their testimony was consistent with the evidence that White was close to Ms. Stewart's apartment near the time of the crime. And White's own availability further diminished any reliability concerns. *Compare Chambers*, 410 U.S. at 302.

privilege and even immunize forensic evidence, despite its fallibility, against legitimate attack.

No one disputes that trial judges have "wide latitude" to determine the relevance of evidence and to exclude evidence that is "'repetitive . . . , only marginally relevant,' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Crane*, 476 U.S. at 689-90 (quoting *Van Arsdall*, 475 U.S. at 679); *see*, *supra*, at 29-30. But whatever the exact scope of the latitude states may enjoy in applying these commonplace standards to the particulars of a defendant's third-party guilt evidence, that latitude cannot possibly extend to requiring, as a condition of admissibility, that competent and reliable third-party guilt evidence actually overcome the prosecution's evidence and establish a reasonable inference of innocence, or to creating a blanket rule of inadmissibility in cases where the prosecution has "strong" forensic evidence. Such a rule does nothing to advance the search for truth, which in our system is achieved not through judicial fiat at the evidentiary stage but through "the crucible of meaningful adversarial testing," *Crane*, 476 U.S. at 691, and serves no purpose except the invalid purpose of "improving the State's likelihood of winning a conviction against a certain type of defendant," *Montana v. Egelhoff*, 518 U.S. 37, 67 (1996) (O'Connor, J., dissenting). For just as the Constitution proscribes dispensing with the confrontation of witnesses because a judge has deemed certain evidence reliable, so too it proscribes excluding reliable evidence because a judge deems it insufficiently probative when measured against the state's case. Both are "akin to dispensing with jury trial because [in a judge's view] a defendant is obviously guilty." *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

Since *Chambers*, this Court has several times applied its principles to declare unconstitutional evidentiary bars that precluded defendants from introducing relevant and competent potentially exculpatory evidence. *Rock*, 483

U.S. at 61; *Crane*, 476 U.S. at 691. It has even done so, with respect to the testimony of percipient witnesses, when the basis for this testimony (hypnotic refreshment) created threshold reliability concerns not present here. *Rock*, 483 U.S. at 61. On a few occasions, the Court has upheld evidentiary bars in order to prevent defendants from subverting the integrity of the truth-seeking process through litigation gamesmanship[16] or pursuant to the familiar practice of excluding expert opinion testimony based on debatably reliable data.[17] But since *Washington v. Texas* made the Sixth Amendment applicable to the states, 388 U.S. at 19, this Court has never countenanced a state evidentiary rule excluding, as South Carolina has, relevant, competent, reliable, and timely proffered evidence from percipient witnesses who would testify directly to a defendant's innocence. The Court has also looked with particular disfavor on evidentiary rules, like South Carolina's, that "burden[] only the defense and not the prosecution." *Scheffer*, 523 U.S. at 316 n.12 (citing *Washington*, 388 U.S. at 22-23).

As a general matter, the Court has repeatedly emphasized that state rules inhibiting an accused's right to present a defense may not be "arbitrary" or "'disproportionate to the purposes they are designed to serve.'"

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[16] In *Taylor v. Illinois*, 484 U.S. 400 (1988), for example, the Court affirmed the exclusion of a defense witness after defense counsel failed to give timely notice to the prosecution. As the Court emphasized, this "severest sanction" was justified by the defendant's willful violation of the rule, the fact that the proffered testimony was likely perjurious, and because the rule itself served the vital purpose of protecting the "integrity of the adversary process" and its "truth-determining function." *Id.* at 414-17; *see also Michigan v. Lucas*, 500 U.S. 145 (1991) (permitting preclusion sanction for violation of rape shield law notice requirement in exceptional circumstances).

[17] *See Scheffer*, 523 U.S. at 308 (upholding exclusion of polygraph evidence based on policy judgment that such evidence is not sufficiently reliable).

*Scheffer*, 523 U.S. at 308 (quoting *Rock*, 483 U.S. at 56). South Carolina's third-party evidence rule flunks this test. As the facts of this case show, the rule arbitrarily excludes relevant, competent, and reliable evidence for no reason other than the facial strength of the prosecution's case and establishes a standard for admitting third-party guilt evidence that is grossly disproportionate to any conceivable concern about filtering out evidence that is tangential, repetitive, or likely to cause prejudice or confusion. The Constitution allows no such thing.

### C. Barring Holmes from Cross-Examining the State's Witnesses About Third-Party Guilt Violated His Rights Under the Confrontation Clause of the Sixth Amendment

Not only was Holmes prevented from casting doubt on the prosecution's case against him by introducing evidence tying Jimmy White to the attack on Ms. Stewart, he also was barred from cross-examining the York police officers about why they discounted leads pointing to White and instead set their sights on Holmes as the culprit from day one. This powerful line of cross-examination could have further exposed the slipshod police investigation and magnified the holes in the State's forensic evidence. This yet additional ramification of South Carolina's rule on third-party guilt evidence violated Holmes' right of cross-examination under the Confrontation Clause of the Sixth Amendment, which guarantees the right of a criminal defendant "to be confronted with the witnesses against him." U.S. CONST. amend. VI. *See Crawford*, 541 U.S. at 47-49; *Coy v. Iowa*, 487 U.S. 1012, 1017-19 (1988).

This Court has many times held that the Constitution promises criminal defendants the right not merely to confront the government's witnesses in the physical sense, but also to subject those witnesses to cross-examination before the jury. *See Crawford*, 541 U.S. at 48-49 (noting

Framers' conception that confrontation of witnesses includes the right to cross-examine them in front of the jury); *Van Arsdall*, 475 U.S. at 678 ("'the main and essential purpose' of [the Confrontation Clause] is to secure for the [defendant] the opportunity of cross-examination" (citation omitted)); *see also United States v. Owens*, 484 U.S. 554, 557 (1988) ("[The Confrontation Clause] has long been read as securing an adequate opportunity to cross-examine adverse witnesses."). Indeed, the Court repeatedly has labeled the right of cross-examination an indispensable component of the overarching guarantee of a fair criminal trial. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 405 (1965) ("There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

This emphasis on the central importance of the right to cross-examination reflects the vital role it plays in adducing the reliability of evidence and promoting the search for truth that a jury – not a judge – must conduct in criminal trials. *See Lee v. Illinois*, 476 U.S. 530, 540 (1986). As this Court observed in *California v. Green*, 399 U.S. 149 (1970), the Confrontation Clause both "forces the witness to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth," and also "permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Id.* at 158. Similarly in *Crawford*, this Court emphasized that, pursuant to the Confrontation Clause, the reliability of the government's witnesses against the defendant must be assessed by a jury (not a judge) "in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . , but about how reliability can best be determined." *Crawford*, 541 U.S. at 61, 68.

Although most of this Court's Confrontation Clause cases have involved challenges to the government's use of out-of-court statements by witnesses who did not testify at trial and who thus were not cross-examined at all by the defendant, *see, e.g., id.* at 40, the Court also has addressed Confrontation Clause challenges to restrictions on the scope of cross-examination. *See, e.g., Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (per curiam); *Van Arsdall*, 475 U.S. at 679-80; *Davis v. Alaska*, 415 U.S. 308, 317-18 (1974). In this line of cases, the Court has insisted that such restrictions should be narrowly focused and anchored in concerns about "harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. The Court has been wary of restrictions that sweep more broadly and "effectively emasculate the right of cross-examination itself," *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985), and has repeatedly invalidated restrictions that denied the defendant a meaningful opportunity to conduct cross-examination.

In *Olden*, for example, the trial court barred a black defendant in a rape case from cross-examining the white complainant about her extramarital affair with another black man as a means of showing that the defendant's relationship with her also was consensual. 488 U.S. at 229-30. This Court summarily reversed, characterizing the restriction on cross-examination as "beyond reason," and stating that "[s]peculation as to the effect of the jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the complainant's] testimony." *Id.* at 232. Along the same lines, in *Van Arsdall* and *Davis*, the Court struck down limitations on cross-examination that effectively prevented the defendants from highlighting to the jury possible biases of key government witnesses. *Van Arsdall*, 475 U.S. at 679-80; *Davis*, 415 U.S. at 317-18. As the Court stressed in *Van Arsdall*, "[a] reasonable jury might have received a

significantly different impression of the [witness'] credibility had [the defendant] been permitted to pursue his proposed line of cross-examination." 475 U.S. at 680; *see Davis*, 415 U.S. at 318 (limitation on cross-examination rendered defendant "unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked the degree of impartiality expected of a witness at trial").

Like the defendants in *Olden*, *Van Arsdall*, and *Davis*, Holmes' opportunity to conduct a meaningful cross-examination was significantly circumscribed. Under South Carolina's rule on third-party guilt evidence, Holmes was precluded altogether from questioning any of the State's witnesses about the evidence linking Jimmy White to the crime. Had Holmes been able to inquire about third-party guilt on cross-examination, he could have asked the testifying police officers whether they were aware that multiple witnesses had said that Jimmy White confessed to them that he had attacked Ms. Stewart. Holmes also could have asked the officers whether they were aware that multiple witnesses had seen White in the vicinity of Ms. Stewart's apartment on the morning of the attack. Additionally, Holmes could have asked the officers whether they were aware that White more closely matched Ms. Stewart's description of her attacker than did Holmes. And Holmes could have asked the officers whether they were aware that White had both a violent streak and an attraction to older women. If the officers had answered yes to these questions, then Holmes could have followed up by probing why the officers disregarded the litany of evidence pointing to White as the culprit. If the officers had answered no to the questions, then Holmes could have followed up by probing into the lack of depth and quality of the officers' investigation. Either way, the cross-examination on third-party guilt evidence could have had a devastating impact on the State's case against Holmes.

Like the cross-examination that was cut off in *Olden*, the cross-examination that Holmes was barred from conducting had the "strong potential to demonstrate the falsity" of the State's case. 488 U.S. at 232. In particular, it would have bolstered Holmes' arguments (which he was forced to make without the benefit of third-party guilt evidence) that the police investigation was extremely lax, and that his arrest and prosecution amounted to a rush to judgment by the State. And like the cross-examination that was cut off in *Van Arsdall* and *Davis*, the cross-examination that Holmes was barred from conducting could have furnished support for the notion that the government witnesses were biased against him. In particular, this cross-examination would have illuminated Holmes' argument that York police officers, especially James "Boot" Smith, harbored a grudge against Holmes (either historically or because of their encounter with Holmes in the early morning hours of the day of the attack on Ms. Stewart).[18]

All told, through cross-examination on the subject of third-party guilt evidence, Holmes may have been able to diminish the credibility of the government's witnesses in the minds of the jurors. But the jury never heard this avenue of cross-examination. Instead, applying South Carolina's rule on evidence of third-party guilt, the South Carolina Supreme Court arrogated to itself the jury's function of making credibility determinations and decided, based solely on a reading of the trial transcript, that evidence connecting Jimmy White to the Stewart attack did

[18] As it was, Holmes sought to show the officers' bias against him. But as was true of the defendants who were constrained in their efforts to demonstrate bias on cross-examination in *Van Arsdall* and *Davis*, Holmes was handicapped because he was precluded on cross-examination from making the most powerful case of bias – namely, that the officers turned a blind eye towards evidence linking White to the assault on Stewart and directed their focus entirely on Holmes.

not "overcome" the State's evidence against Holmes. A crucial line of inquiry on cross-examination, "the greatest legal engine ever invented for the discovery of truth," *Green*, 399 U.S. at 158, thus was unconstitutionally short-circuited.[19]

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below and order that a new trial be granted.

Respectfully submitted,

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[19] The trial court initially was inclined to permit Holmes to cross-examine the State's witnesses about third-party guilt evidence. App. 197-98. Shortly before Holmes presented his defense, however, the trial court abruptly changed its mind and barred this line of questioning. App. 200-02. There is no indication that the imposition of this restriction was based on concerns about "harassment, prejudice, confusion of the issues, the witnesses' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679. Moreover, the trial court itself had determined that the evidence of third-party guilt was sufficiently probative and credible as to raise a reasonable inference that Holmes was innocent. App. 134-35.